Revija za evropsko pravo: XI (2009) 1-3.

Jelena SANFEY*

UDK: 342.4(4-672EU)

pp. 51-64.

THE EFFECT OF THE EUROPEAN COMMUNITIES ACT 1972 AND THE HUMAN RIGHTS ACT 1998 ON THE UK'S CONSTITUTIONAL ORDER CONSIDERING THE PRINCIPLE OF PARLIAMENTARY SOVEREIGNTY[1]

Abstract

In this paper, author discusses the challenging of British constitutional doctrine in respect of two statutes: the European Community Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA 1998). Both statutes subject the UK Parliament to a supra-national controlling mechanism. The European Convention of Human Rights (ECHR) is interpreted by the European Court of Human Rights (ECtHR) European Treaties are interpreted by the European Court of Justice (ECJ). The main task of this essay is to examine the effects of these statutes on the UK's constitutional order in order to determine the limitations of sovereignty of UK Parliament.

***Key words**: European Community Act 1972; Human Rights Act 1998; UK Parliament; Constitutional Order; Principle of Parliamentary Sovereignty.*

---

* Jelena Sanfey, London.

[1] This paper is done as the research paper for Constitutional Law and European Law subjects in my law studies at University of London.

1. INTRODUCTION

The UK does not have a written constitution. Instead, the central point of British constitutionalism is the sovereign parliament. According to the "orthodox"[2], Diceyian, constitutional theory Parliament can legislate on whatever it wants, no court can question the validity of its laws and it cannot bind itself for the future[3]. The essay will discuss the challenging of British constitutional doctrine in respect of two statutes: the European Community Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA 1998).

Both statutes subject the UK Parliament to a supra-national controlling mechanism. The European Convention of Human Rights (ECHR) is interpreted by the European Court of Human Rights (ECtHR). European Treaties are interpreted by the European Court of Justice (ECJ). ECA 1972 and HRA 1998 have introduced these international documents into the domestic legal system. Possible clashes may therefore occur: post-ECA and HRA legislation may be contrary to the international documents. *Prima facie*, according to "orthodox" constitutional theory there is no problem: parliament is sovereign and can legislate on anything it wants with the effect of the later statute prevailing. However, based on the development of case law post-ECA and HRA, this essay will argue differently, emphasising two main points.

First, while both statutes have changed "orthodox", Dicey's constitutional order, the legal and constitutional, consequences of the two Acts are different. ECJ decisions in the UK are fully legally protected, perhaps because they concern mainly economic rather than human rights. In the case of the ECHR, while the ECtHR can award damages and ultimately expel the country from the Council of Europe, there is no legal way to introduce Strasbourg's court decisions into the domestic legal system. That depends on the public and on the political power of the court in Strasbourg.

---

[2] It is referred to as "orthodox" partly because it does not fully correspond with either political or legal reality. First, it would be politically impossible for certain measures to be enacted by parliament despite its powers. Second, Parliament has traditionally managed to bind its successors.

[3] "If there is a clash between a later and an earlier norm then the later is taken to be impliedly repealed or disapplied by the former" See: P. Craig, G. Búrca, *EU Law, Text, Cases, and Materials*, 4th edition, Oxford University Press, 2008, p. 365. Compare for definition: A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition, Macmilan, London, 1959, p. 39-94 (taken from: A. L. Young, Hunting Sovereignty: Jackson v Her Majesty's Attorney-General, Case Comment, *Public Law*, 2006, p. 187.).

Second, the essay shows that probably the most important constitutional impact is the new constitutional role courts gained. In implementing the two Acts courts have become the readers and prophets of the particular political reality, especially in the case of the ECA. The political significance of the ECA had been used to award the courts not only with new interpretation techniques[4], but also with the new functions of protecting the Parliament from any (past or future) unwanted contra-EC legislation and guarding the citizens' European rights. Unlike the HRA, where the court can only go as far as to issue a Declaration of Incompatibility and therefore produce public pressure on the Parliament, in the case of the ECA the courts can literally put the words in the mouth of Parliament.

2. EUROPEAN COMMUNITY ACT 1972 ISSUES

The question of whether the sovereignty of the UK parliament is jeopardized has been debated since the UK joined the EU (then the EEC) in 1973. The main cause of worry was EC law supremacy over the national legal systems in Member States. EC law supremacy took place as the result of ECJ activity in two cases: *van Gend en Loos*[5] and *Costa*[6] and was fully established among Member States nearly a decade before the UK joined the Union.

Briefly, *Van Gend*[7] ruled that a Treaty provision will be enforced even if there is conflicting national legislation. Individuals were granted the right to enjoy EEC law rights before their national courts, and national courts were deemed to be the most important instrument for the effective application of community law[8]. The principle of direct effect made inevitable the development of the doctrine of supremacy, which was subsequently defined clearly in the *Costa*[9] case.

---

[4] The ECA requires courts to interpret laws in accordance with the Act.

[5] Case 26/62 [1963] ECR 13.

[6] Case 6/64 [1964] ECR 585.

[7] Case 26/62 [1963] ECR 13.

[8] F. G. Jacobs, The State of International Economic Law: re-thinking Sovereignty in Europe, *Journal of International Economic Law* 2008, p. 9-11. For more detailed discussion see: P. Craig, G. Búrca, *op. cit.*, p. 272-275.

[9] Case 6/64 [1964] ECR 585.

Costa[10] ruled that the EEC Treaty has created its own legal system which, on entry into force, became an integral part of the legal systems of the Member States which their courts are bound to apply[11]. The Community's legal powers are born out of a limitation of sovereignty or a transfer of powers from the States to the Community. The ECJ in *Costa*[12] ruled that Member States have limited their sovereign rights, and created a body of law that binds both their nationals and themselves[13]. So, these were the facts established by the ECJ and accepted by Member States long before the UK joined the EC. It is, therefore, not surprising that serious questions about parliamentary sovereignty were raised before the UK joined the EC[14].

After joining the Community, the UK passed the ECA in order to make way for Community legislation to enter into the domestic legal system. The ECA in s2 (4) states that "any enactment, *passed or to be passed*, …shall be construed and have effect subject to directly effective EU laws". As the case law suggests, courts took the view that wording from s2(4) "*passed or to be passed*" meant that all Acts, most importantly including those inconsistent with, but passed after, ECA, would not have domestic legal effect[15].

The first UK case that tested the ECA was *Macarthys v Smith*[16]. The question was whether the Sex Discrimination Act 1975 (SDA) as the later Act would prevail over the ECA (in accordance with Dicey "orthodox" constitutional theory) or would the British court follow the ECJ ruling in *Costa*[17] and accept

---

[10] Case 6/64 [1964] ECR 585.

[11] See the ECJ ruling in the *Costa* case 6/64 [1964] ECR 585.

[12] Case 6/64 [1964] ECR 585.

[13] Costa case 6/64 [1964] ECR 585. Further on, in the *Internationale Handelsgesellschafg mbH* case 11/70 [1970] ECR 1125, the ECJ ruled as irrelevant the legal status of the conflicting national law. This case led to a serious conflict between the German Constitutional Court and the ECJ.

[14] The political debate continued after the UK joined the EC. It culminated in 1975 when a Referendum about EC membership was held. The turnout was 65%. Nearly 68% voted for EC membership and 32% against it. Parliament and Government were not legally obliged to respond to the referendum result, but the political consequences of not doing so would have been unthinkable.

[15] See I. Loveland, *Constitutional Law, Administrative Law and Human Rights, A Critical Introduction*, 4th edition, Oxford University Press, 2006, p. 445.

[16] *Macarthys v Smith* [1979] 3 ALL ER 325, CA.

[17] Case 6/64 [1964] ECR 585.

the precedence of EC law?[18] Lord Denning gave a judgment which stated that in EEC matters, the doctrine of implied repeal will not have effect because any law inconsistent with EEC obligations could not have been Parliament's intention but was caused by error in language used[19].

The next case was *Garland v British Rail*[20] in which the same question arose: conflict between SDA 1975 and ECA 1972. Lord Diplock followed Lord Denning's conclusion: EEC law prevailed. However, his reasoning was different. Lord Diplock did not go into Parliament's intentions as Lord Denning did; instead he emphasised that the ECA had introduced a new interpretation rule which obliged courts to read all domestic legislation with respect to EEC obligations[21]. Both judgments, however, found that domestic law inconsistent with EEC obligations would be applied only if given in "express positive terms"[22].

Such terms were used in the Merchant Shipping Act 1988 (MSA). In *Factorame*[23] the court considered the ultimate test: not only that the MSA was a later statute but also that it was unambiguous about the goals which it intended to achieve, which were inconsistent with directly effective EC law. The House of Lords decided to ask the ECJ whether interim relief could be granted to Spanish trawler-owners who claimed that the MSA violated Community law and that they would suffer irreparable damage if they had to obey English law. The House of Lords, following the ECJ's principle of full effectiveness of Community law, took the unprecedented step of restraining the Secretary of State from obeying the MSA[24].

---

[18] For discussion see: I. Loveland, *op. cit.*, p. 456-457. Also: T. R. S. Allan, Parliamentary Sovereignty: Lord Denning's dexterous revolution, *Oxford Journal of Legal Studies (OJLS)* 1983, p.22-33.

[19] Ibid. Also: Lord Denning judgment in: *Macarthys v Smith* [1979] 3 ALL ER 325, CA.

[20] Garland v British Rail Engineering Ltd [1983] 2 AC 751.

[21] See Lord Diplock judgment in *Garland v British Rail Engineering Ltd* [1983] 2 AC 751. For detailed comment on the judgment: I. Loveland, *op. cit.*, p. 458.

[22] *Ibid*.

[23] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[24] In fairness, it is important to add that the Queen's Bench Divisional Court immediately understood both the importance and the significance of the ECA 1972 and had proposed what had in the end turned out to be the right decision, that is, to send the question to Luxembourg. However, it was only after the appeal process that the question was actually

After *Factorame*[25] the constitutional order was changed and a new view on judges' position in the constitutional framework arose. What was the source which allowed judges such power as to effectively change the Parliament's will, for example as expressed in MSA 1988? One answer would be to point to judges' political attitude for EU integration. Another view is that it was judges' belief that Parliament had chosen to join the EU, a supra-national entity, understanding all legal consequences, and that this would be of the highest importance in reaching the decision[26]. The latter was the reasoning Lord Bridge gave in his judgment in *Factorame*[27] in which he stated that EC membership had posed limitations on sovereignty of which Parliament in 1972 was fully aware[28]. Therefore, Lord Bridge argued that the new constitutional order, which limited Parliament's sovereignty, was born from the fact of British membership in the EC and was purely underlined by passing the ECA in 1972. The final point in Lord Bridge's judgment in *Factorame*[29] is that the presumption that an Act of Parliament is compatible with Community law unless and until held to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid, as the House of Lords held in *Hoffmann-la Roche & Co. A.G. v. Secretary of State for Trade Industry*[30].

But how did the ECA get "entrenched", that is, safe from amendment and repeal of future Parliament?[31] And if it was possible with ECA, would it be possible with other statutes? Professor Wade finds that the new doctrine "makes sovereignty a freely adjustable commodity whenever Parliament

---

sent to Luxembourg where the principle of absolute effectiveness of Community law was spelled out.

[25] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85.

[26] T. R. S. Allan, Parliamentary Sovereignty: Law, Politics and Revolution, *Law Quarterly Review* 1997, p. 445.

[27] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[28] See Lord Bridge's judgment in: *Factorame Ltd v Secretary of State for Transport* [1991] ALL ER 70.

[29] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[30] [1975] A.C. 295. See: Lord Bridge judgment in: *Factorame Ltd v Secretary of State for Transport* [1991] ALL ER 70.

[31] Definition of "entrenched" legislation found in Ian Loveland, *op.cit.*, p. 37.

chooses to accept some limitations"[32]. In other words, entrenchment is easily achieved, no referendums or special procedures are needed, and it is possible whenever Parliament uses language which expressly means "entrenchment". Professor Loveland, on the other hand, is of the opinion that the final authority for entrenchment is with the courts, and that "sovereignty is freely adjustable commodity whenever the *courts* choose to impose some limitations"[33].

Somewhat more radical views are put forward by Professor Allan, who argues that courts are permitted to disapply the legislation if it finds it undemocratic, and that, therefore, the decision in *Factorame*[34] takes into account two different constitutional implications: one for democracy, and one concerning legal certainty[35]. According to him, even though legal certainty favored the ECJ decision, full exclusion of any deliberate breach of EC law would be undemocratic[36]. A similar argument is given by Professor Craig who looks at the historical background of parliamentary sovereignty and finds its root in the original 1688 need for Parliament to represent the national interest, which is unlikely to stand in modern days when Parliament is more seen as the promoter of political party interests[37]. Craig further argues that the EC Treaty has itself higher democratic capital than MSA 1988 and that, therefore, the Treaty can be seen as a "higher" form of law[38].

The finally chapter on "entrenching" the ECA was given in *Thoburn v. Sunderland*[39]. Four greengrocers and a fishmonger tried to challenge the UK's implementation of European Metrication Directives. The constitutional significance of *Thoburn*[40] goes beyond the question of EC law supremacy,

---

[32] H. R. W. Wade, Sovereignty-revolution or evolution, *Law Quarterly Review* 1996, p. 568-575 (as found in: I. Loveland, *op. cit*., p. 483).

[33] I. Loveland, *op. cit.,* p. 484.

[34] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[35] T. R. S. Allan (1997), p. 446.

[36] *Ibid*.

[37] P. Craig, Sovereignty of the United Kingdom after Factorame, *Yearbook of European Law*, p. 221-255 (as found in: I. Loveland, *op. cit*., p. 485-486).

[38] *Ibid*.

[39] *Thoburn v. Sunderland DC* [2002] EWHC 195; [2002] 3 W.L.R. 247.

[40] *Ibid*.

because the ECA, among some other Acts, was given "constitutional", "special" status. In his judgment in *Thoburn*[41] Laws L.J. argues that the ECA has a special status in British law protecting it from being implicitly repealed, because there are two categories of Acts of Parliament, "ordinary" and "constitutional", the latter ensuring constitutional rights and which can be repealed not by implication but only by "unambiguous words on the face of the later statute"[42]. Therefore, in common with all other EU members, the UK is developing a set of rules that can be "entrenched" in the same way as constitutions in other member countries are.

3. HUMAN RIGHTS ACT 1998 ISSUES

The European Convention on Human Rights (ECHR) is the work of the Council of Europe, a body established soon after World War II ended, and it therefore pre-dates the EC. The Convention came into force in 1953. Individuals were empowered with the right to take states before the European Court of Human Rights (ECtHR). If found in repeated breach of Convention rights, a state could be suspended or eventually expelled from the Council[43]. The British government gave individuals the right to petition under the Convention in 1965[44].

Before the HRA was passed UK courts did not have mechanisms to implement rights from the Convention, but they were able to use it as an aid in statutory interpretation[45]. In 1975, as the number of British cases brought before the ECHR rose and as EC law was directly applied, domestic judges became more aware of the Convention[46]. The HRA incorporated the

---

[41] *Ibid*.

[42] *Ibid*.

[43] That was the case with Greece between 1967-1970. Obligations imposed on the state are in the realm of international law. The ECtHR would require from the Party in breach to bring domestic law in line with the Convention, to compensate victims, or take other steps required by the ECtHR. See: D. Feldman, *Civil Liberties and Human Rights in England and Wales,* 2nd edition, Oxford University Press, 2002, p. 49.

[44] H. Barnet, *Constitutional and Administrative Law*, 6th edition, Cavendish, London, 2006, p. 492.

[45]However, Murray Hunt's analysis found that in the first two decades of the convention's existence (1953-1973) the document was only once cited in domestic courts, probably due to the impression that UK law was protecting human rights as much as the Convention. See: M. Hunt, *Using Human Rights Law in English Courts*, Oxford Hart Publishing, 1997, p. 131 (as found in: I. Loveland, *op. cit.,* p. 668).

[46] *Ibid*.

Convention in domestic law. Conventional rights have vertical effect (against public authorities) and, more interestingly, horizontal effect (against private parties, as in *Douglas v Hello*[47] and *Campbell v MGN*.[48])[49]. In *Venables*[50] the court recognised the "right to privacy"[51], which did not exist in English common law[52].

The HRA brought fears for parliamentary sovereignty[53]. However, compared to the ECA (discussed above), the HRA was much less powerful. The HRA "provides a new basis for judicial interpretation of all legislation, not a basis for striking down any part of it"[54]. Courts can issue a Declaration of Incompatibility with Convention rights, but it will be up to Parliament to amend legislation. A Declaration of Incompatibility can have two effects[55]. Assuming the Government's positive attitude towards the Convention, the Declaration will alert to unintended breaches, or if the assumption is that the Government is trying to condone a breach of the Convention, the Declaration will serve to put ministers under public pressure.

One of the ways in which the HRA affected the role of the courts was that it gave courts instructions on how to do interpretation. Judgments of the ECtHR have to be taken into account, but they are not binding for domestic judges[56]. For example, in *Leeds*[57] the Court of Appeal concluded that judgments of ECtHR and House of Lords were inconsistent and that the

---

[47] [2001] QB 967 CA. For the comment see: I. Loveland, *op.cit*., p. 756-757.

[48] [2001]

[49] H. Barnet,. *op.cit*., p. 519. See also: I. Loveland, *op.cit*., p. 721 and p.724-729.

[50] *Venables v News Group Newspapers Ltd* [2001] 1 ALL ER 908.

[51] Article 8 of the Convention.

[52] In *Kaye v Robertson* [1991] Glidewell LJ said: "It is well known that in English Law there is no right to privacy" as quoted from: H. Barnet, *op. cit*., p. 519.

[53] In addition, for decades it was considered "undemocratic" to place supra-national authority in the hands of judges – both domestic and European. See comment in: I. Loveland, *op. cit*., p. 667.

[54] White Paper, Rights Brought Home: The Human Rights Bill, Cm 3782, 1997, London: HMSO para 2.14 (in: H. Barnet, *op. cit*., p. 513).

[55] I. Loveland, *op. cit.,* p. 720.

[56] Judges are not bound to "follow slavishly" ECtHR judgments. See: H. Barnet, *op. cit*., p. 513.

[57] Leeds City Council v Price (2006).

Court was bound to follow the House of Lords' one[58]. However, the novelty is that domestic courts implement the principles of proportionality and necessity, tools developed by the ECtHR which are more generous in protecting human rights than is the case with the unreasonableness test employed in judicial review. In *R v Secretary of State*[59] the House of Lords applied the test of necessity when concluding that some prison policies (*inter alia*, search of privileged legal correspondence) are unlawful[60].

The case of *A v Secretary of State*[61] is a good example of the HRA's achievements, according to Professor Loveland[62]. The case dealt with the Anti-Terrorism, Crime and Security Act 2001, which in s (23) gave the power to the Home Secretary to detain for an indefinite period without criminal charge any foreigner, which the Home Secretary finds to be a terrorist, if the person does not return to his home country. The House of Lords found that s (23) is a disproportional measure to achieve the protection of the public from terrorist attacks and that the section breached the prohibition on nationality-based discrimination. An Incompatibility Declaration was issued. The Government could have opted to act according to s (23). Instead it chose to amend the section. On the other hand, Professor Diamantides points out the lack of judicial (political) power to declare the declaration of (indefinite public) emergency as incompatible with the HRA, even though the court had previously found that the indefinite state of public emergency is not a qualifying reason to derogate from the right to fair trial[63]. Finally, in February

---

[58] See: H. Barnet, *op. cit.*, p. 513.

[59] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26. For the comment see: I. Loveland, *op. cit.*, p. 759. and H. Barnet, *op. cit.*, p. 519.

[60] Another example in: *R v Chief Constable of Sussex ex Parte International Trader's Ferry Ltd* [1999] 2 AC 418 court used proportionality to judge on the number of police officers caught in demonstrations between animals exporters and animal rights activists and concluded that number of police officers should be proportionate to the right of exporters to export and demonstrators to peacefully demonstrate. See: *Constitutional and Administrative Law*, Student Handbook 2008/2009, School of Law, Birkbeck College, p. 88.

[61] [2004] UKHL 56; [2005] 2 AC 68.

[62] I. Loveland, *op. cit.*, p. 761.

[63] *Constitutional and Administrative Law,* Student Handbook 2008/2009, School of Law, Birkbeck College, p. 36. For further details on the case see: M. Allen, B. Thompson, *Cases and Materials on Constitutional and Administrative Law,* 8 th edition, Oxford University Press, 2006, p. 775. For further details on Declaration of Incompatibility see: D. Feldman, *op. cit.*, p. 91.

2009 in *A and others v UK*, the ECtHR found different violations of the right to liberty[64] and lack of compensation rights at the national level[65].

The HRA allows judges to strike down secondary legislation unless the parent Act makes it impossible, with the exception of Orders in Council which HRA protects[66]. Giving Orders in Council protection that is guaranteed to primary legislation has been criticised[67]. In this context the HRA compromised parliamentary sovereignty by making it possible for the executive to pass a law, without parliamentary authority, that defies Conventional rights[68].

Is the HRA a "constitutional" Act, and does it contravene Dicey's doctrine of Parliamentary sovereignty? The HRA did not have as an aim to "entrench" human rights and in that way fill the gap of a non-existent written constitution. However, it contravenes "orthodox" Parliamentary sovereignty similarly to the ECA: both pieces of legislation "instruct the court as to the principles of statutory interpretation which they should deploy"[69]. The Blair government, which introduced the HRA, took the view that judges will be better than politicians to "draw the *preliminary* conclusion as to whether moral principles have been compromised", but the power to draw the *final* decision stays in the same hands[70]. From that point one can hardly argue a special constitutional status for HRA, but the main point is that judges have gained some political power by being able to signal to Parliament "unmoral" actions.

---

64 The court found that there was a violation of Article 5(1) (right to liberty and security) because the applicants were not being held with a view to deportation and their indefinite detention discriminated between nationals and non-nationals; article 5(4) (right to have lawfulness of detention decided by a court) as the applicants could not challenge the application against them. See: Application no 3455/05.

65 Interestingly, the court awarded low compensation on the grounds that the unlawful detention was imposed in the face of public emergency and as "an attempt to reconcile the need to protect the UK public against terrorism with the obligation not to send the applicants back to countries where they faced a real risk of ill-treatment". See: Application no 3455/05.

66 H. Barnet, *op. cit*., p. 515.

67 See: *ibid*. and D. Feldman, *op. cit*., p. 89.

68 D. Feldman, *ibid*.

69 I. Loveland, *op. cit*., p. 716.

70 *Ibid*., p. 736.

So far, the number of incompatibility declarations is small and judges more rely on the doctrine of deference, which protects the invisible line between the courts' and parliamentary competencies in a similar way as the ECtHR uses the doctrine of "margin of appreciation" to allow the states discretion with which the ECtHR is not interfering[71]. Several cases illustrate this point[72]. In *Alcorbuny*[73] the House of Lords ruled that planning matters are within the competencies of the executive, not the court. In discussing whether mandatory life sentence for all convicted murders is in breach with Convention rights in *Lichniak*[74] the House of Lords ruled that the policy should be determined by Parliament, not courts. In *Prolife Alliance v BBC*[75] the House of Lords overturned the decision of the Court of Appeal by deciding that limits of freedom of expression should stay within the power of Parliament.

4. CONCLUSION

This essay has examined critically the view that the UK parliament has unlimited sovereignty. However, despite this long-held view, it is no longer the case today. Britain still does not have a written constitution but it has new legal shackles: EU membership which requires unconditional observance of EU laws, and the HRA 1998.

The ECA made parliamentary sovereignty subject to EU law supremacy, as confirmed by a body of case law. However, HRA achievements are more modest. Politicians may come under pressure if a Bill is not compatible with the HRA and citizens can protect their rights before domestic courts, but there is no legally binding mechanism to protect Convention rights from the will of parliamentary majority. More problematic is that executive prerogative powers are treated as primary legislation for the purposes of HRA. However, judges now have an instrument to protect human rights, and

---

71 In addition to doctrine of deference which is the main reason for small number of incompatibility declarations, others are mentioned: 1) HRA does not have retrospective effect and therefore cannot be applied on facts occurred before it; 2) there are cases where declarations have been overturned on the appeal and 3) any procedural defects will turn cases to supervisory jurisdiction of the courts. See: H. Barnet,. *op.cit*., p. 520-521.

72 For further details see: *Ibid.,* p. 521-522.

73 R v Secretary of State for the *Enviroment ex parte Holding and Barnes plc* [2001] UKHL 23.

74 *R v Lichniak* [2002] UKHL 47.

75 R (on the application of Prolife Alliance) v British Broadcasting Corporation [2003] UKHL 23.

future cases may depend on their willingness to use it, possibly to challenge (through an incompatibility declaration) the executive's use of an *indefinite* state of emergency as a legal excuse to derogate from Convention rights[76].

Both ECA and HRA have changed the constitutional system, the first based on economic interests, the second on the political pressure to protect human rights. How long the change will last nobody knows. The UK may decide to leave EU (especially if one imagines the EU incorporating ECHR as directly effective law) and new reasons could be found for derogation from Convention rights. This is unlikely to happen, but one can never be sure.

Jelena Sanfey[*]

Dejstvo Zakona o Evropskim zajednicama iz 1972. godine i Zakona o ljudskim pravima iz 1998. godine na ustavni poredak Ujedinjenog Kraljevstva u pogledu principa parlamentarne suverenosti

Rezime

U radu autor je analizirao dejstvo Zakona o Evropskim zajednicama iz 1972. godine i Zakona o ljudskim pravima iz 1998. godine na ustavnopravni poredak Velike Britanije. Zakon o Evropskim zajednicama je potčinio parlamentarnu suverenost Velike Britanije pravu Evropske unije, što je potvrđeno u sudskoj praksi. Članstvo u EU zahteva bezuslovno poštovanje prava EU. S druge strane, efekti Zakona o ljudskim pravima su skromniji. Političari mogu biti pod pritiskom, ako nacrt zakona nije kompatibilan sa Zakona o ljudskim pravima, a građani mogu tražiti zaštitu svojih prava pred domaćim sudovima. Međutim, u Velikoj Britaniji ne postoji pravno obavezujući mehanizam za zaštitu prava iz Evropske konvencije o ljudskim pravima od volje parlamentarne većine.

I Zakon o Evropskima zajednicama i Zakon o ljudskim pravima su promenili ustavni sistem Velike Britanije. Zakon o Evropskim zajednicama je doneo promene koje se zasnivaju na ekonomskom interesu, a Zakon o

---

[76] For a discussion of this issue, see Diamantides, *op. cit*., p.36.

[*] London.

ljudskim pravima promene zasnovane na političkom pritisku da se štite ljudska prava. Koliko će dugo ove promene trajati, ne može se u ovom trenutku znati. Velika Britanija može odlučiti da napusti EU (naročito ako bi se dogodilo da EU inkorporiše Evropsku konvenciju o ljudskim pravima kao direktno primenjivo pravo), a mogu se pronaći novi razlozi za odstupanje od prava iz Evropske konvencije o ljudskim pravima. Ovo se verovatno neće dogoditi, ali niko ne može biti siguran.